Supreme Court, U. S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1978

Nos. 78-1298, 78-1430

WILLIAM BAIRD, ET AL

Petitioners

v.

ALEXANDER SHARP II

Respondent

PRETERM, INC., ET AL

Petitioners

v.

EDWARD M. KING, ET AL

Respondents

Respondents' Opposition To Certiorari

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Respondents' Brief In Opposition To Certiorari

Question Presented For Review

Whether the Hyde Amendment alters federal Medicaid requirements so as to permit states to limit their funding for abortions to the same extent that Congress has limited federal funding for abortions?

Statement of the Case

The two petitions to which this opposition responds attack on substantially the same grounds a decision of the Court of Appeals for the First Circuit. The Court invalidated Massachusetts restrictions on Medicaid funding for abortions, but to a lesser extent than petitioners had sought. The respondent state officials have not appealed from that part of the circuit Court's judgment invalidating the state restrictions.[1]

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[1] The respondent in No. 78-1298 is no longer Alexander E. Sharp. He has been replaced as Commissioner of Public Welfare by John D. Pratt. The petitioners in No. 78-1430 have replaced all the original defendants (footnote cont.)

These cases arose as a result of the Massachusetts Legislature's enactment, as part of its fiscal year 1979 budget, of a provision limiting the use of state Medicaid funds for abortions to three categories: abortions necessary to prevent the death of the mother, cases of forced rape, or cases involving incest.[2] The first complaint, originally captioned Baird

1 (cont.)

in the caption to their petition with the proper successors in office.

[2] Mass. Stat. 1978, ch. 367, § 2, Item 4402-5000. The abortion language reads as follows:

> provided, further that no funds appropriated under this item shall be expended for the payment of abortons not necessary to prevent the death of the mother. This provision does not prohibit payment for medical procedures necessary for the prompt treatment of the victims of forced rape or incest if such rape or incest is reported to a licensed hospital or law (footnote cont.)

v. Sharp, was filed on July 12, 1978. The second, originally captioned Preterm v. Dukakis, was filed on July 13, 1978. Both cases raised not only a claim of conflict between the state restrictions and Title XIX of the Social Security Act 42 U.S.C. § 1396 et seq (the Medicaid Act) but equal protection and privacy claims as well. However, the district Court and the parties focused on the question of statutory conflict. The issue plaintiffs posed in both actions was whether the state law violated what they asserted was a requirement of Title XIX: that states participating in the Medicaid program reimburse participating providers for expenses incurred in rendering "medically necessary" services to Medicaid recipients.

At hearings held July 14, 1979, to consider plaintiffs' request for a temporary restraining order, and July 19, 1978, to consider preliminary injunctive relief, the state defendants argued in response to the claim of conflict that: (a) Title XIX imposed no require-

2 (cont.)

> enforcement agency within thirty days after said incident.

It was carried over in its 1978 form into FY 1979. P.L. 95-480, § 210, 92 Stat. 156.

ment that a state fund all services deemed by a physician to be "medically necessary"; and (b) if such a requirement did exist, it was modified in the area of abortions by the Hyde Amendment.[3] In the defendants' view the Hyde Amendment constituted a Congressional decision to cut back on the federal government's own obligation under Medicaid and thereby to reduce the states' obligation to the same degree.

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[3] The Hyde Amendment is now a universally accepted label for language originally inserted in the FY 1977 appropriations bill for the Department of Health Education and Welfare, which administers the Medicaid program. As originally enacted in P.L. 94-439, § 209, the Hyde Amendment read as follows:

> None of the funds contained in this Act shall be used to perform abortions except when the life of the mother would be endangered if the fetus were carried to term.

This language was modified by Congress for FY 1978 to read:

(Footnote cont.)

The district court denied temporary relief, since the abortion funding restrictions were not slated to take effect until August 1, 1978; however, on July 28, 1978, it entered a preliminary injunction based on its conclusion that Title XIX did impose a requirement that states reimburse providers for all "medically necessary" services rendered to Medicaid recipients, including abortions. The Court, however, agreed with the state defendants on the Hyde Amendment issue, and accordingly enjoined implementation of the state statute only to the extent it imposed funding restrictions greater than Congress had specified in the Hyde Amendment.

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3 (cont.)

> [N]one of the funds provided for in this paragraph shall be used to perform abortions except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest, when such rape or incest has been reported promptly to a law enforcement agency or public health service; or except in those instances where severe and long-lasting physi-

(footnote cont.)

All parties appealed from this determination,[4] and, after obtaining a consolidation of the preliminary injunction with the merits under Fed. R. Civ.P. 65(a)(2), they proceeded with briefing and argued the appeal orally on October 6, 1978.[5]

The decision of the Court of Appeals, released on January 15, 1979, contains two quite separate parts. In its first part, the Court agreed with the state defendants that Title XIX carries within it no requirement

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3 (cont.)

> cal health damage to the mother would result if the pregnancy were carried to term when so determined by two physicians.

It was carried over in its 1978 form into FY 1979. P.L. 95-480, § 210, 92. Stat. 156.

4 On August 7, 1978, the Court of Appeals granted the Preterm petitioners' motion for an injunction pending appeal. The injunction required the state to provide Medicaid funding for all "medically necessary" abortions.

5 The two cases, Baird and Preterm, were consolidated on appeal for purposes of argument.

that a state provide funding for all services deemed by a recipient's physician to be "medically necessary." Preterm Petition (Pet.) 5a-8a, 26a.[6] However, it did conclude that the limitations imposed by the state law were invalid on a far narrower ground. Observing that the restrictions lacked any justification related to cost savings or maternal health, the court determined that the restrictions were unreasonable and inconsistent with the objectives of the federal statute. Preterm Pet. 10a, 26a.

In the second part of its decision the Court of Appeals, after a lengthy analysis, concurred with the district Court's and state defendants' view of the Hyde Amendment.[7]

The Baird petitioners seek review of both parts of the Court of Appeals' decision. The Preterm petitioners contest only the second part.

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6 The Court of appeals' opinion appears in both the Preterm and Baird petitions for certiorari. In this and in all subsequent references to the opinion, respondents cite only to the Preterm petition for one sake of consistency.

7 Judge Bownes dissented from this part of the decision. Preterm Pet. 27a-35a.

Reasons for Denying the Writ

I. Although the Question of State Abortion Funding Requirements Under Medicaid is An Important One, This Case Constitutes A Poor Candidate for Review Because the Underlying Issue of Title XIX's Meaning is Not Properly Before This Court and the Hyde Amendment question is Currently in an Interlocutory Posture.

The respondents agree with petitioners that the issue left open in Beal v. Doe, 432 U.S. 438 (1977), is an important one. The Court itself stated:

> [S]erious statutory questions might be presented if a Medicaid plan excluded necessary medical treatment from its coverage... Id. at 444-445.

If the current state policy trend toward reimbursement restrictions continues,[8] triggering a lengthy docket of

[8] The restrictions are often imposed as part of a state's yearly budget appropriations bill, as is the case in Massachusetts. Thus, as a formal matter, such measures are temporary in duration and self-termina-
(footnote cont.)

federal and state litigation,[9] this Court's consideration of the recurring legal issues appears inevitable. However, this case offers a poor occasion for review of these issues since it would leave unresolved far more important questions than it would settle.

First, this Court would not reach the overriding question of whether, and to what extent, Title XIX prohibits state abortion reimbursement restrictions, absent the Hyde Amendment. The state defendants have chosen not to appeal that part of the Court of Appeals decision; therefore, were it to grant review, this Court would be foreclosed from confronting the central issue in all the litigation cited by petitioners as

8 (cont.)

ting at the end of each fiscal year. However, it appears that the current inclination is to make insertion of the restrictive appropriations language a perennial event. The temporary nature of restrictions therefore would not render them moot. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973).

[9] See cases collected in Court of Appeals decision, Preterm Pet. 2a-3a, supplemented by Preterm petitions at 11, n.9.

the justification for seeking certiorari.[10]

To be sure, the Baird petitioners attempt to raise this Title XIX issue. They include as one of their questions presented the following:

> Whether or not the Court of Appeals erred in deciding that abortion services which are deemed medically necessary by the woman's attending physician need not be funded under a state's plan. Baird Petition at 2.

That question, if properly presented, would strengthen the position that review is appropriate. However, the Baird petitioners are not the proper party to raise the issue. The Court found in their favor under Title XIX, albeit on the grounds of unreasonableness rather than on the "medically necessary" ground advanced in the Baird complaint. A party who prevails below may not appeal solely because he dislikes the theory upon which the Court relied in granting him relief. See Thompson v. Roberts, 24 How. 233, 240-241 (1860). Review in such circumstances would amount to nothing more than an advisory opinion, since whatever this Court's

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[10] See n. 8, supra.

view of the question whether Title XIX includes a "medically necessary" requirement, the basic conclusion that the state statute was inconsistent with Title XIX would not change. Under these petitions for certiorari the first part of the Court of Appeals decision is beyond review, and, without it, this case constitutes an inadequate vehicle for considering state restrictions on the reimbursement of expenses for Medicaid abortions.

There is a second and independently troublesome barrier in the way of review of the petitions for certiorari. The issue properly raised in both petitions concerns the meaning of Hyde Amendment; however, the Court of Appeals disposition on the Hyde Amendment is interlocutory in nature and renders review in this Court premature.

After determining that the Congress had altered Title XIX Medicaid Act "to the extent of its repugnancy with the Hyde Amendment," the court directed as follows:

> We now remand the case for consideration of the constitutional questions that remain open—namely, whether the Hyde Amendment, construed as a substantive alteration

> of the Medicaid Act and thus requiring the states to establish plans that provide abortion services in no more than those instances which are specified in the Hyde Amendment, is constitutional. Preterm Pet. 26a-27a.

Since neither party had briefed or argued the constitutionality of the Hyde Amendment in the district or circuit Court, the remand order was appropriate. See Singleton v. Wulff, 428 U.S. 106, 119-121 (1976). Similarly, without any treatment of this issue below, the parties could not properly argue it for the first time in this Court. See, e.g., Wood v. Strickland, 420 U.S. 308, 326-327 (1975).

The controversy over the Hyde Amendment is therefore in mid-stream. To avoid piecemeal decision-making with its attendant waste of judicial resources, this Court has adopted a presumption against interlocutory review on writs of certiorari. See, e.g., Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co., 389 U.S. 327, 328 (1967).[11]

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[11] Petitioners would not be prejudiced by denial of their writ at this time. If the lower Courts hold the (footnote cont.)

If the Hyde Amendment is to be the subject of this Court's analysis, such review should occur in a setting which includes all the pertinent issues now outstanding, both statutory and constitutional, and on a concrete record which sharpens the presentation of the issues. See W.E. B. DuBois Clubs v. Clark, 309 U.S. 389, 312 (1967). Such a presentation will only be possible after the process of litigation contemplated by the Court of Appeals in its remand order is completed.[12] Accordingly, this Court should deny review at this time.

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11 (cont.)

Hyde Amendment unconstitutional, petitioners will have no need to pursue further review. Conversely, if the Hyde Amendment is held constitutional, petitioners may seek review of all issues in this Court, those raised in their current application and both those which would become ripe upon a Court of Appeals determination of constitutionality. See Milwaukee & Minn. Railroad Co. v. Soutter, 2 Wall. 510, 521 (1864).

[12] The remand order was not a ministerial formality, nor is it now interposed by respondents for purposes of (footnote cont.)

II. The Decision of the Court of Appeals That the Hyde Amendment Constituted More Than A Device to Shift the Cost of Abortions to the States Was Correct.

A further reason for denying the petitions for certiorari is the careful, thorough and correct analysis of the Court of Appeals on the effect of the Hyde Amendment.

The Hyde Amendment reflects a decision by Congress against the use of taxpayers' dollars for abortions in categories beyond those specified by the Amendment's terms. By contrast, petitioners' argument would simply read the Hyde Amendment as shift-

12 (cont.)
delay. To the contrary, the question of the validity of the Hyde Amendment is a difficult con- stitutional issue; it has absorbed the resources and energies of another lower federal Court for some time. McRae v. Califano, (E.D.N.Y., No. 76-1804). For the early history of this case, see McRae v. Mathews, 421 F. Supp. 533 (E.D.N.Y. 1976), vacated and remanded for further consideration in light of Maher v. Roe and Beal v. Doe. Califano v. McRae, 433 U.S. 916 (1977). The Preterm petitioners acknowledge that the "constitutionality of the 1978 Hyde Amendment was the subject of an extensive trial in McRae . . . . Preterm Pet. at 9, n.5.

ing the payment for Medicaid abortions from two public purses to one. Whereas, in the past the state and federal governments have split the cost of Medicaid abortions, petitioners see the states as now responsible for 100 percent of all abortions legislated out of the federal component of the Medicaid program by the Hyde Amendment. Not only would such a result be an unprecedented anomaly in a cooperative federal-state benefits program, cf. New York Department of Social Services v. Dublino, 413 U.S. 405 (1973), it flatly contradicts the will of Congress. The Court of Appeals' exhaustive review of Congressional history establishes plainly that the members of Congress, regardless of their position on the policy merits of the Hyde Amendment, recognized as a body the following salient point:

> 1. As an initial matter, the Hyde Amendment, if enacted, would preclude use of federal funds for all abortions outside the narrow, specified categories. On this first point the parties are not in dispute;
> 2. As a matter of federal statutory mandate, Congress believed that the states would be free to fund, or not fund, abortions

excluded by the Hyde Amendment. Preterm Pet. 18a-19a.

3. As a matter of practical expectations, every member of the Congress or Senate whose remarks touched even faintly upon the subject assumed that states would—and could—choose not to finance abortions beyond those permitted by the Hyde Amendment; see generally Court of Appeals opinion, Preterm Pet. 14a-19a.

4. On the few occasions when the attention of the Congress was drawn to the fact that the Hyde Amendment constituted substantive legislation extending beyond the usual limits of appropriations bills, it acknowledged that fact and proceeded to legislate, thereby underscoring the inescapable conclusion that it was making a policy decision on Medicaid abortions, not merely a budget exercise, as petitioners urge. Preterm Pet. 15a-17a.

The petitioners assert a position in opposition to the ineroxable conclusion to be drawn from these four points, but they offer no counter evidence from the legislative record. Instead, they pin their argument on

a single narrow doctrine which they read into this Court's decision in Tennessee Valley Authority v. Hill, 98 S. Ct. 2279 (1978). That case, they urge, imposes an inflexible prohibition on construing appropriations riders to effect changes in substantive statutes. To this argument the Court of Appeals gave the appropriate response:

> [P]laintiffs' assertions . . . require[] us to do violence to the Medicaid Act ...The Medicaid program is one of federal and state cooperation in funding medical assistance; a complete withdrawal of the federal prop in the system with the intent to drop the total cost of providing the service upon the states runs directly counter to the basic structure of the program...
>
> [T]he principle that two statutes should if possible be found capable of co-existence does not suggest that we should approach the statute with blinders and reconcile them at all costs... Preterm Pet. 22a-23a.

In so stating the Court followed the teachings of United States v. Dickinson, 310 U.S. 554 (1940), a case

which petitioners have tried unsuccessfully to distinguish. See Preterm Pet. at 17. In Dickerson this Court held as follows:

> Congress could suspend or repeal the authorization contained in [a substantive statute bestowing benefits on individuals] and it could accomplish its purpose by an amendment to an appropriation bill or otherwise. United States v. Dickerson, 310 U.S. 544, 555 (1940).

Because the Court of Appeals correctly applied past decisions of this Court and engaged in a thorough and painstaking review of the legislative record to determine the intent of Congress, its judgment should stand.

CONCLUSION

For the reasons set forth above the Court should deny the petitions for certiorari in Nos. 78-1298 and No. 78-1430.

Respectfully submitted,

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